Commission has reached this conclusion, it has determined that *wireline* competition had been instrumental in spurring the deployment of *wireline* advanced telecommunications capability.[113]

Thus, the presence of intramodal *wireline* competition has been a key guarantor of broadband deployment since 1996. The ILECs' implied promises of broadband deployment, however, have not provided any reassurance to this effect whatsoever. Even firm promises that the ILECs have made to the Commission often have not been kept. This problem has been most prevalent in the ILECs', specifically SBC's and Verizon's, failure to comply with merger conditions some of which they themselves proposed and that the Commission adopted as federal law. For example, the Commission has issued a Notice of Apparent Liability for Forfeiture to SBC for having failed to comply with certain merger conditions,[114] while Verizon was found to have violated an express pick-and-choose requirement in its merger conditions (taken largely from the SBC conditions).[115] Both SBC and Verizon flood the Commission with merger condition waiver requests and compliance deadline extensions, seeking to undo or delay what they agreed to do in the first place and more importantly what the Commission deemed

---

the supply side of the equation. "Bush Administration Focuses on Increasing Demand for Broadband," Communications Daily at 3 (Mar. 6, 2002). Residential broadband take rates remain low because most consumers are unwilling to pay for it as no broadband application has spurred the transition of broadband from an expensive convenience to "must have" status.

113 The Commission expressly recognizes in the *Third Advanced Services Report* that its procompetitive rules, particularly those governing collocation and line sharing, are key to fostering competition and, in turn, encouraging deployment. *See generally Third Advanced Services Report*, ¶¶ 135-138. With respect to DSL service, the Commission has found that "DSL deployment began in response to the 1996 Act and the presence of competitive access providers." *Third Advanced Services Report*, ¶ 68.

114 *SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-00-IH-0432, Notice of Apparent Liability for Forfeiture, DA 00-2858 (rel. Dec. 20, 2000) (imposing an $88,000 fine for "willful and repeated violation of the merger conditions" by failing to report accurate carrier-to-carrier performance data for Texas, Oklahoma, Kansas, Missouri, Arkansas, California and Nevada).

115 *Global NAPs v. Verizon Communications*, File No. EB-01-MD-010, Memorandum Opinion and Order, FCC 02-59 (rel. Feb. 28, 2002) (granting in part Global NAPs complaint alleging that Verizon refused to permit it to import a reciprocal compensation provision from its Rhode Island agreement to its agreements with Verizon in Virginia and Massachusetts). In that case, the Commission was authorized to impose a fine

. . . *Continued*

necessary to satisfy the public interest.[116] Indeed, on at least one occasion, the Common Carrier Bureau formally notified SBC of its "serious concerns regarding SBC's interpretation of the *Merger Conditions*."[117] The Commission's continued need to monitor and correct SBC's and Verizon's actions speaks for itself. The pile of fines SBC and Verizon have incurred at the state level for failing to meet merger condition performance guarantees also suggests that the Bells make promises they don't intend to keep or simply don't even do the due diligence to figure out if they can keep them in the first place.[118]

As to promises of broadband deployment specifically, considerable evidence has been uncovered showing that ILECs have consistently broken promises to deploy facilities capable of supporting broadband. In New Jersey, Indiana,[119] and Massachusetts,[120] to name some

---

for the proven Verizon violation, but did not. It also denied Global NAPs' claim for damages as "premature." *Id.*, ¶ 1.

116 *See, e.g.*, Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau, to James W. Callaway, Group President - SBC Services (rel. Aug. 14, 2000) (responding to the written request of SBC, dated August 4, 2000, for an extension of the deadline for filing of performance data required under Condition 24 of the merger conditions); Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau, to Michelle Thomas, Executive Director - Federal Regulatory, SBC Telecommunications, Inc. (rel. Nov. 13, 2001) (responding to the written request of SBC for a one-month extension to file results on an independent audit of SBC's compliance with Condition 24).

117 Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau, to Cassandra Carr, Senior Executive Vice President – External Affaires, SBC Communications, Inc. (rel. Oct. 16, 2000) (stating that SBC may not, as it had stated, perform network planning and engineering on behalf of its advanced services affiliate for more than 180 days).

118 *See e.g., Illinois, Indiana, Michigan, Ohio, Wisconsin -- Ameritech to Pay $1.1 M in December Penalties*, TR's State NewsWire, Feb. 22, 2002 (state commissions in Illinois, Indiana, Michigan, Ohio and Wisconsin ordered fines against Ameritech exceeding a total of $1.1 million for multiple violations of the SBC-Ameritech Merger Conditions relating to the quality of services provided to competitive carriers).

119 Ameritech-Indiana negotiated an alternative regulation scheme that included a program called "Opportunity Indiana" that required Ameritech to invest $120 million to provide broadband facilities to schools, hospitals and government centers; it later abandoned the program on the grounds that there was no demand in these sectors for broadband access. Bruce Kushnick, "How the Bells Stole America's Digital Future: A NetAction White Paper, at 16 (available at www.newnetworks.com). Bell Atlantic-New Jersey had promised to invest more than $1 billion in fiber optic network upgrades yet spent only $79 million. *Id.* at 13-14.

120 In 1994, New England Telephone ("NYNEX") promised that it would deploy at least 330,000 fiber access lines throughout Massachusetts by the end of 1995. In exchange for that promise, the Massachusetts Department of Telecommunications and Energy implemented a price-cap regulatory system as NYNEX

. . . *Continued*

examples, incumbents failed to deploy broadband facilities as was required in exchange for considerable deregulation by these state commissions. Literally billions of dollars in network upgrades, including the now-infamous "fiber-to-the-home" initiative, were promised but never completed. The Commission therefore should not rely on similar ILEC promises in this proceeding, either explicit or implicit, to invest in broadband deployment in exchange for relaxing unbundling obligations.

As demonstrated above, UNE-based competition serves as a highly effective means of realizing the goals of encouraging the deployment of advanced telecommunications capability. Thus, Section 251 unbundling serves to promote competition, and competition promotes the deployment of broadband as required in Section 706. Given the Bells' current market position (near monopoly), granting the deregulation they seek would serve the goals of neither Section 251 nor 706. Moreover, with respect to every UNE, insulating ILECs from unbundling obligations – potentially irrespective of whether CLEC impairment exists – would violate the purpose and plain language of the Act. Having seen that the advent of competition has provided incentives for, rather than discouragement of, investment by both incumbents and competitors,[121] the Commission should continue to view Sections 251 and 706 as complementary provisions of the 1996 Act.

---

had requested. A few months later, in 1996, NYNEX announced that it was discontinuing its deployment plans. New Networks Institute Complaint to the Massachusetts D.T.E. at 6-7 (Oct. 6, 1999) (available at www.newnetworks.com).

121 "In 2000, incumbent LECs invested almost $29.4 billion in infrastructure." *Third Advanced Services Report*, ¶ 69. ILECs as a group spent $100 billion on network upgrades and improvements from 1997 to 2000 – *after* passage of the 1996 Act, compared with $82 billion in the period 1992-1995. Federal Communications Commission, *Telecommunications @ the Millenium*, Figure 10 (Feb. 8, 2000).

9. Nothing in the 1996 Act Precludes Carriers From Relying on Both UNEs and Resale to Serve Customers

The Commission also asks whether it can require incumbents to provide both UNEs and finished resale service to competitors in combination."[122] The simple answer to this question is "it can and it should." The CLEC Coalition finds no statutory prohibition against this practice, and instead finds Congress's tacit approval.

Congress established that there would be three methods of competitive entry – resale, UNEs and facilities-based entry.[123] The statute does not evince any congressional preference for one mode over another and the Commission previously has not discerned any congressional preference for one mode of entry over another.[124] Thus, whether a competitor uses its own facilities exclusively, UNEs, resale, retail, tariffed access, or a hybrid of any of these means to reach customers has no bearing on either the Commission's statutory unbundling analysis.

Moreover, there is no compelling public policy reason for erecting an artificial barrier between UNEs and services, whether resale or tariffed access services. Indeed, the only purpose that existing "co-mingling" restrictions serve (and serve well) is to make access to the provisioning of competitive services to end users more difficult and expensive. Imposing additional "co-mingling" restrictions would merely perpetuate the Commission's current misguided creation of yet another opportunity for ILECs to arbitrage supra-competitive special

---

122 *NPRM*, ¶ 70.

123 47 U.S.C. §§ 251(c)(3) & (4). *See also* Joint Explanatory Statement at 148. The Commission has consistently held that the three modes of entry are equally valid and necessary for the development of competition: "Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy." *Local Competition First Report and Order*, 11 FCC Rcd. at 15509, ¶ 12; "Congress did not express explicitly a preference for one particular competitive arrangement," but "recognized implicitly that the purchase of unbundled network elements would, at least in some situations, serve as a transitional arrangement until fledgling competitors could develop a customer base and complete the construction of their own networks." *UNE Remand Order*, 15 FCC Rcd. at 3700, ¶ 6.

access prices and raise competitors' costs. The Commission should correct its past misstep – which was to adopt a "co-mingling" restriction in the context of EEL conversions – and refrain from adopting new regulatory constructs designed solely to keep ILECs fat and competitors' costs and consumer prices artificially high.

B. The Commission Cannot Reverse or Diminish Current Unbundling Rules Absent a Clearly Articulated Rationale That Is Supported by Substantial Record Evidence

The Commission is bound in this review by bedrock principles of administrative procedure. According to the long-standing doctrine articulated in *State Farm*,[125] a decision by an administrative agency to modify or rescind an existing rule or policy must be "rational, based on the consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute."[126] Specifically, a reviewing court will require that the agency's decision be accompanied by a "reasoned analysis indicating that prior policies and standards are being deliberately changed, and not casually ignored."[127] Indeed, the federal courts have declined to uphold actions by the Commission which tend to *unreasonably* reverse its existing rules and policies "without adequate explanation."[128] Accordingly, any decision reached by the Commission in this proceeding must be supported by a reasoned opinion that satisfies the "rational basis" standard of judicial review set forth in *State Farm*.

---

124 *UNE Remand Order*, 15 FCC Rcd. at 3700-3701, ¶ 6; *Local Competition First Report and Order*, 11 FCC Rcd. at 15509, ¶ 6.

125 *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

126 *State Farm*, 463 U.S. at 42-43.

127 *Id.*, 463 U.S. at 43-44; *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)). To effect a change of law or policy, a federal administrative agency must articulate the factual basis for its decision, and must address significant comments made in the rulemaking proceeding and reasonably obvious alternative rules. *State Farm*, 463 U.S. at 43.

The Commission's decision must be rational in its assumptions as well as its conclusions.[129] For example, the Commission's inquiry in this proceeding appears to be based on an assumption that "technological advances and marketplace changes" have coalesced in such a manner that the "initial phase" of the Commission's implementation of the statute should now be over.[130] However, the Commission's assumption must be supported by record evidence showing that the market has completed an "initial phase" of competitive development if it means to effect substantial changes to its "initial phase" of implementation rules.[131] Indeed, evidence assembled by the CLEC Coalition for these comments suggests that local competition remains in its nascent "initial stage" and, in light of the current capital crunch, is likely to remain there for some time. To move onto a "second phase" of implementation characterized by more lenient unbundling rules and exceptions would patently ignore this market reality. Simply put, the Bells' success in thwarting competition has stalled the possibility of any rationally considered move to such a second phase of implementation. Neither wishful thinking nor promises of enforcement or broadband can supply the required record evidence to support such a premature transition.

Similarly, the Commission cannot, without a good and well-articulated reason, make dramatic changes in its approach to reviewing its unbundling rules. Historically, the Commission's two-tiered unbundling analysis under Section 251 of the 1996 Act focuses primarily upon the "practical, economic and operational" capabilities of competitive carriers to provide telecommunications services absent the provision a specific network element by the

---

128 *E.g., People of the State of California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California II*").

129 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414 (1971).

130 *NPRM*, ¶ 15; *see also id.*, ¶¶ 1, 33, 48, 53, 55, 61, 64, 67.

131 *Church of Christ*, 707 F.2d at 1425.

incumbent LEC.[132] In this proceeding, the Commission's unbundling inquiry seems instead to focus upon highly specified market-related and technological considerations, including the telecommunications services provided by competitive carriers, the facilities used to provide such services, and the customer and geographic markets served.[133] If this dramatic shift in Commission focus is translated into a memorandum, opinion and order, it could result in dramatic rule changes. Any such rule changes must be rationally based in a supportable belief that Congress intended these new considerations to be given equal weight to the clear unbundling mandates in Section 251, for agencies have no discretion to replace Congress' clear instruction with their own policy.[134]

Indeed, any decision to significantly adjust the current regulatory framework for mandatory unbundling by ILECs must be supported by more than a mere observation that circumstances in the telecommunications market have changed since the passage of the Act. The Commission's rules governing ILEC provision of UNEs have been carefully developed, over a span of several years, to advance the procompetitive objectives of the Act.[135] Any departure from these rules, or from the Commission's underlying regulatory policies, must be substantiated by tangible factual evidence demonstrating that the current regulatory framework no longer promotes competition in the market for telecommunications services. Thus, it will not be sufficient to simply assert "changed circumstances"; rather, those changes must be demonstrated and it must be explained how they impact Commission rules and why any rule changes are necessary to implement the statute faithfully.

---

132 *UNE Remand Order*, 15 FCC Rcd. at 3721-3722, ¶ 44. *See also id. at 3778*, ¶ 180, at 3790, ¶ 208, at 3802, ¶ 236, at 3806, ¶ 246, at 3846, ¶ 331, at 3868, ¶ 385, at 3877, ¶ 408, at 3887, ¶ 432, at 3893, ¶ 445.

133 *See NPRM*, ¶¶ 33-44.

134 *E.g., AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992).

Without hesitation, the federal courts have declined to uphold actions by the Commission which reverse existing rules and policies absent "adequate explanation."[136] For example, the Ninth Circuit in *California I* and *California II* remanded a series of Commission orders to eliminate structural separation requirements for BOCs providing enhanced services because the Commission failed to provide a reasoned analysis supporting that the requirements at issue were no longer necessary to preserve market competition.[137] The Ninth Circuit flatly rejected the Commission's imprecise conclusion – the sole basis for its dramatic reversal – that "market and technological changes" precluded the anti-competitive behavior initially targeted by the structural separation requirements.[138]

The D.C. Circuit has also regarded with great suspicion sudden actions by the Commission tending toward deregulation of communications markets. For example, in *United Church of Christ*, the Court applied a "heightened" level of scrutiny to the Commission's proposed "rule and policy changes that would effect substantial deregulation of commercial broadcast radio."[139] Although it reluctantly upheld several of the Commission's mandates, the Court warned "that Congress, and not the Commission, may be the more appropriate source of significant deregulation." *United Church of Christ*, 707 F.2d at 1443. In addition, on review of the Commission's rules promulgated pursuant to the Communications Act of 1934, the D.C.

---

135 *See NPRM*, ¶ 1 n.3.

136 *California II*, 39 F.3d at 926. *See also People of the State of California v. FCC*, 905 F.2d 1217, 1233 (9th Cir. 1990) ("*California I*").

137 *See id.*

138 *California II*, 39 F.3d at 925. *See also California I*, 905 F.2d at 1233-38.

139 *United Church of Christ*, 707 F.2d at 1418.

Circuit noted that "abrupt shifts in policy do constitute *danger signals* that the Commission may be acting inconsistently with statutory mandate."[140]

In sum, a decision by the Commission in this proceeding that dramatically alters its existing rules implementing Congress' unbundling mandates may well constitute action that is beyond the scope of the Commission's authority. The Commission could do no greater harm to the advancement of local competition (and broadband deployment) by overstepping the considerable grant of authority already given to it by Congress. Clearly, the Bells would like to undo significant parts of the 1996 Act – this is not the appropriate forum.

C. Current Deviations from the Unbundling Framework Remain Unsound and Should Be Eliminated Immediately

As the Commission previously has found, the unambiguous language of the statute does not permit the imposition of use restrictions on UNEs.[141] Yet, the Commission imposed restrictions on CLECs' ability to convert special access circuits to EELs and on the use of such UNE combinations. Although the Commission's authority to impose use restrictions on an interim basis was upheld once before, the underpinnings for that affirmance are not present with respect to EEL and entrance facility conversions.

Indeed, the Commission's imposition of "interim" and "transitional" use restrictions on EEL and entrance facility conversions cannot be justified on the grounds previously offered by the FCC. The Commission's "safe harbors" neither protect implicit universal service subsidies nor discourage facilities-based competition. Instead, they merely provide the ILECs with a

---

140 *Id.*, 707 F.2d at 1425.

141 The Commission explicitly rejected the notion that any service provided through use of UNEs could be restricted to any type or class of service. *Local Competition First Report and Order*, 11 FCC Rcd. 15680-81, ¶¶ 359-361. In addition, Rule 51.309(a) states unequivocally that an ILEC "shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that

. . . *Continued*

windfall at the expense of competitors and consumers alike. While the protection of universal service revenues and the promotion of facilities-based competition are certainly legitimate policy goals, the protection of ILEC special access revenues certainly is not.[142] Accordingly, this deviation from the Commission's unbundling framework should be eliminated immediately.

The Commission's "interim" EEL conversion use restrictions do not serve (nor have they ever served) to protect universal service subsidies. Special access revenues have never been a source for such funding. Moreover, ILEC claims that their special access services are "competitive" deny the notion that there is any nexus between those services and universal service. To the extent the ability to convert special access circuits (including entrance facilities) to EELs could be seen as drawing from ILEC switched access revenues, the imposition of use restrictions is no more justified. Switched access revenues also do not include implicit universal service subsidies.

Indeed, Section 254 of the Act is quite clear that implicit universal service subsidies were to be eliminated as soon as practicable.[143] The Fifth Circuit has twice affirmed Commission action removing such subsidies. And, if there was ever a legitimate doubt, the Commission's CALLS order and subsequent MAG order affirmatively removed them.[144] Thus, if the

---

would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a).

142 CLEC Coalition members are unaware of any reason as to why universal service and access charge issues should be considered in the unbundling analysis. *See NPRM*, ¶ 32.

143 Section 254 requires the Commission to establish rules including "a definition of the services that are supported by Federal universal service support mechanisms," consistent with Congress's mandate that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. §§ 254(a)(2), (b)(6).

144 *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193, 15 FCC Rcd. 12962, 12965 ¶ 3; *Multi-Association Group (MAG) Plan for Regulation of the Interstate Services of Non-Price Caps Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, FCC 01-304 ¶ 3 (rel. Nov. 8, 2001); *see also NPRM*, ¶ 32.

consideration of universal service funding and access charges was ever a legitimate aspect of the Commission's unbundling analysis, it is certainly no longer the case.

CLEC Coalition members are particularly offended that the protection of facilities-based competitors was used by the Commission as an excuse to deny them the ability to convert special access circuits to EELs. The availability of UNEs and EELs in particular lowers facilities-based competitors' costs of essential network inputs. Accordingly, it is the Commission's EEL conversion and use restrictions that undermine the market position of most facilities-based carriers. The only carriers that would be disadvantaged by removal of these restrictions are those that have chosen to forsake the use of UNEs and those that seek cover of a pricing umbrella for their own special access services. While it understandable that a facilities-based competitor would forsake the use of UNEs and opt instead to rely exclusively on ILEC special access products to fill-out their own networks, that choice should not be imposed on those carriers whose business plans contemplate cost-based access to UNEs and accept the associated risks. And, while several members of this Coalition stand to benefit from a special access pricing umbrella, it is difficult to argue that supra-competitive pricing is worthy of regulatory protection.

Nevertheless, more than two years have transpired since the ILECs were awarded the windfall implicit in the Commission's use restrictions on the conversion of special access circuits to EELs. Protected by "safe harbors" and a patently absurd "co-mingling" restriction that serves no discernible purpose other than to frustrate CLECs' ability to convert special access circuits to UNEs, the ILECs have managed to thwart substantial numbers of conversions. Two years is time enough to prepare the ILECs to wean themselves off artificially inflated special access revenues and to prepare for the transition to more rational cost-based UNE pricing. If there ever

was a legitimate underpinning – statutory, practical or even political – supporting the imposition of use restrictions on special access conversions to EELs, that underpinning no longer exists.

III. A MORE GRANULAR STATUTORY ANALYSIS SHOULD INVOLVE THE STATES

There is a definite tension between the Commission's proposed use of a "more granular analysis" for Section 251 unbundling and the constructs of minimum national standards, administrative feasibility, and regulatory predictability that have previously been relied on and that have served the Commission well thus far. Although certain components of the proposed "more granular analysis" may be applied in manner that comports with the statute and Congress' intent (for example, a geographic-specific unbundling analysis) some of the Commission's proposed tools for "adopt[ing] a more sophisticated, refined unbundling analysis" appear to be at odds with the plain language and policy underpinnings of the 1996 Act. Among the more infirm proposals are the concept of service-specific UNE analysis and the adoption of automatic "triggers" for repealing UNEs rather than the fact-based impairment analysis that Congress requires the Commission to perform.

The Commission therefore must proceed with caution as it considers taking a "more granular" approach. Even the application of geographic-specific considerations threatens to compromise the considerable benefits of uniform minimum national standards and administrative feasibility. Nevertheless, if the Commission were to proceed down this path, it should develop a strong role for the state commissions in this process, as state commissions are likely better suited to conduct the requisite fact finding and initial review of market conditions in particular geographic areas.

A. Although Geographic-Specific Considerations May Be Appropriate for Determining Unbundling Requirements, Service-Specific Considerations Are Inappropriate as a Matter of Both Law and Policy

The Commission has asked whether its "more granular" analysis should include evaluation of the relevant geographic area or the service for which a UNE is requested.[145] Thus, the Commission seeks to explore in this proceeding the propriety of judging its Section 251 unbundling standard on a location-specific basis, requiring unbundling upon a showing of need in a particular market.[146] In addition, or perhaps alternatively, the Commission asks whether elements should be evaluated on a service-by-service basis, permitting CLECs access to UNEs according to the market conditions for a particular telecommunications service.[147] Of the two, only the geographic consideration could be implemented in a manner consistent with Section 251.

Basic economic theory, current market realities, and the experience of CLEC entry to date suggest that competition may not develop at the same pace in every market, or even within certain markets. Thus, it stands to reason that, if competition creates an environment where competitive access to non-ILEC network elements is ubiquitous, expeditious, comparable in cost and quality, and not likely to create significant operational issues (within the designated geographic area), it may be appropriate to relax unbundling requirements for the corresponding area. The CLEC Coalition notes, however, that it has not found this environment to have developed anywhere in the United States with respect to any UNE. Moreover, in considering this approach, the Commission must consider how such an approach will mesh with its preference for minimum national unbundling standards and administrative feasibility. Adopting

---

145 *NPRM*, ¶ 35.

146 *Id.*, ¶ 36.

the appropriate procedural mechanisms to ensure that a more granular approach is administered properly and in a manner that remains true to the 1996 Act will be exceedingly important. As set forth in more detail below, the CLEC Coalition believes that a more granular review that focuses on impairment in a given geographic area should involve the state commissions, as they traditionally are better suited and situated to conduct such fact finding.

Congress was clear, however, that the services for which elements are used should not be a basis for defining the incumbents' UNE obligations. Section 251 is purposefully agnostic as to the services that a new entrant intends to provide, requiring simply that the entrant not be impaired "in the services that it seeks to offer."[148] The Commission interpreted this language correctly in the *UNE Remand Order* in declining to define elements, for example the local loop, in terms of the services they may support.[149] The Commission "has not previously found that the requirements of Section 251(c)(3) are limited to any particular kind of service."[150] Thus, there is no statutory basis for adopting a service-by-service approach to unbundling requirements.

Moreover, the current technologically-neutral, functionality-based unbundling framework is the only reliable way to encourage the development of new, innovative services.[151] The Commission's imposition of service restrictions on special access conversions is an anomalous

---

147 *Id.*, ¶ 37.

148 47 U.S.C. § 251(d)(2)(B).

149 *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 177.

150 *Id.*, 15 FCC Rcd. at 3777, ¶ 177.

151 "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets." *Advanced* Services *MO&O* ¶ 11. *See also UNE Remand Order*, 15 FCC Rcd. at 3703, ¶ 13 ("For effective competition to develop as envisioned by Congress, competitors must have access to incumbent LEC facilities in a manner that allows them to provide the services they seek to offer, as contemplated in section 251(d)(2) of the Act.").

departure from this sound approach.[152] Limiting the use of UNE combinations derived from special access circuits "to provide a significant amount of local exchange service"[153] runs contrary to the Commission's core policy of ensuring that carriers can use elements to their maximum efficiency and most innovative purpose.[154]

Evaluating other UNEs on a service-by-service basis would artificially, and unlawfully, hinder carriers' flexibility in offering whatever services an element can support. It is not uncommon in the competitive industry for carriers to alter the service provided over a particular element based on technical, economic or competitive need. In today's dynamic telecommunications market, this flexibility is a key asset for new entrants that seek to compete with incumbents on the merits. Congress, recognizing this fact, made clear that CLECs must obtain all necessary incumbent inputs for whatever service they seek to bring to consumers.[155] To micronize the unbundling standard down to the type of services that a particular UNE may support would rob competitors – but not incumbents – of the flexibility needed to compete effectively. In this regard, the Commission must remain mindful that consumers ultimately pay for every bit of ILEC advantage preserved through regulatory policy.

A service-specific unbundling approach also would create uncertainty and stifle innovation. Carriers consistently find new uses for existing facilities – DSL service over copper

---

152 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) ("*UNE Remand Supp. Order*"), *aff'd*, *Supplemental Order Clarification*, FCC 00-183 (rel. June 2, 2002) (extending duration of use restrictions and defining "significant amount of local exchange service") ("*UNE Remand Supp. Clarification Order*").

153 *UNE Remand Supp. Order* ¶ 2.

154 *UNE Remand Order*, 15 FCC Rcd. at 3703, ¶ 14 ("[O]ur unbundling rules are designed to facilitate the rapid and efficient deployment of all telecommunications services, including advanced services."); *Local Competition First Report and Order*, 11 FCC Rcd. at 15681, ¶¶ 359 (stating that Section 251 does not prevent a carrier from using UNEs for any telecommunications service, including long distance service, to compete with incumbents).

155 *See* House Report at 49; *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 177.

loops being a prime example. Consider, then, the situation in which the Commission has determined that a given element meets the "impair" test for a particular service, but that same element supports an innovative service not previously considered by the Commission. If the Commission's unbundling rules expressly define or determine elements according to the services they are permitted to support, the ILECs could refuse to provision the element if a CLEC seeks to provide a service not "certified" for that element. This likely result directly contravenes Congress' express language that unbundled network elements may be used for whatever service the CLEC seeks to provide.[156]

Also problematic is the modern phenomenon of multiple uses for one element serving one customer. The Commission would be required, under a service-specific analysis, to evaluate such arrangements on virtually a customer-by-customer basis. The Commission could not, with its considerable but nonetheless limited resources, track such progress with any accuracy. And those resources would be substantially exhausted in the attempt. Carriers necessarily would also be severely burdened by such a review through their required participation, whether through filing of advocacy pleadings or certifications and audits that would necessarily become a component of a service-by-service approach to unbundling. The sure result of demanding all these efforts of the FCC and of carriers would be a significant slowing, if not a halt, in the development and deployment of innovative services to end users.

---

156 47 U.S.C. § 251(d)(1) (access to nonproprietary elements is required if the failure to provide it "would impair the ability of the telecommunications carrier seeking access to provide the *services that it seeks to offer*") (emphasis added). The Commission consistently has recognized and furthered this technologically-neutral approach. *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 177 ; *Local Competition First Report and Order*, 11 FCC Rcd. at 15679-83 ¶ 356-365.

There are additional reasons why the Commission's suspicion that "a service- or location-specific analysis will be administratively more difficult"[157] is correct. Presently the Commission must review six UNEs (loops, subloops, transport, OSS, call signaling and databases, and switching) under the "impair" standard according to whether any of those facilities are available from third parties or can be self-provisioned in a commercially reasonable scale and under prices, terms and schedules comparable to those provided by ILECs. Were it to adopt service-specific unbundling standards, it could increase exponentially the scope of its review. Loops alone support multiple services, as do transport trunks, each of which must be closely examined as to their relative importance for all of the possible services they may support. Where the Commission now has six focuses for review, it would have 30 or more. If the Commission retains its present three-year review cycle, such UNE review would be a ceaseless effort.

A service-by-service approach also would spur endless and resource-draining disputes between ILECs and CLECs over the use of UNEs. For example, if such an approach were adopted, an element could be certified as a UNE for X service, but not for Y service. CLECs already using that element for Y service would undoubtedly be forced by the ILEC to relinquish the element because their current use would violate FCC rules. In addition, CLECs that later seek to purchase that element from an ILEC would somehow prove or certify that they will use the element only for service X but not service Y. Endless certifications, service audits, and audit disputes would follow.[158] Both the CLEC and the ILEC would be embroiled in an exercise

---

157 *NPRM*, ¶ 40.

158 The Commission should not underestimate the Bells' inclination to use these procedures to inhibit competitors' access to UNEs, to simply drain competitors' resources, or to force concessions of rights otherwise guaranteed by federal law. NuVox currently is trying to fend-off a BellSouth EEL conversion audit request for which BellSouth has hired a group of ex-Bell employees-turned consultants (and most probably quite fine consultants) with a nearly all-ILEC client base as an "independent auditor" and has supplied only a manufactured and unrelated reason for wanting to conduct the audit in the first place.

having nothing to do with the development or provision of innovative services to end users. Local competition would be choked off by a paper stream.

For these reasons, the Commission should reject an unbundling approach that would apply the "impair" test (or the "necessary" test) on a service-specific basis. Rather, the Commission's historical technologically-neutral functionality-based approach to determining UNEs must remain in place to ensure flexibility and administrative practicality, as Congress intended.[159]

B. Capacity Considerations May Be Relevant to Future Unbundling Analysis

The Commission has asked whether capacity considerations and/or how a functionality is delivered may be relevant to the unbundling analysis.[160] The answers to those questions, respectively, are "possibly" (but it is too early to tell) and "generally, no".

1. Capacity Considerations

A loop is a loop and dedicated transport is dedicated transport, regardless of the technology used or capacity of those circuits.[161] Nevertheless, it is quite conceivable that capacity considerations may at some point become relevant to future Commission unbundling analysis regarding loop and transport UNEs.[162] Indeed, it is conceivable that wholesale alternatives will develop more quickly and that self-supply will be easier to cost-justify with

---

159 *UNE Remand Order*, 15 FCC Rcd. at 3761, ¶ 142, 3777, ¶ 177.

160 *NPRM* ¶ 41.

161 As has been repeatedly shown, the Commission is deliberately and consistently technologically-neutral when defining network elements. *UNE Remand Order*, 15 FCC Rcd. at 3777, ¶ 177; *Local Competition First Report and Order*, 11 FCC Rcd. at 15679-83, ¶ 356-365. The technology deployed in delivering the required functionality should only become relevant if the technology used fails to deliver the designated functionality in the manner requested. For example, NuVox has experienced problems with at least one ILEC with DS1 UNE loops provisioned over copper facilities via DSL. NuVox's experience is that these loops are functionally inferior to DS1 loops provided over fiber facilities.

162 *See NPRM*, ¶ 41.

respect to higher capacity loop and transport UNEs. However, it is premature to judge or predict as to whether or not this actually will be the case.

For example, at this point in time, CLEC Coalition members do not find it any easier to find third-party alternatives for DS3 loops and transport than it is for DS1 loops and transport.[163] The threshold issue appears to be more a matter of whether any alternatives are available than a matter of what capacities are available.[164] Moreover, if alternative facilities are available, multiple capacities may be available as lower capacity facilities often ride fatter pipes. However, because no provider deploys unlimited capacity, quantities of higher capacity circuits may prove to be limited. In addition, access to derived, lower capacity circuits may be contingent on commitments regarding larger circuits. Nevertheless, Coalition members' marketplace experience to date suggests that the availability of wholesale high-capacity loop and transport alternatives has not developed more quickly for certain capacity circuits, as opposed to others.[165]

Similarly, although it might easier to cost-justify self-supply of a higher capacity loop or transport segment, it is likely to take longer to get to the point where volumes justify the build. Even then, construction factors such as rights-of-way, time-to-market/delay and expertise must be considered.[166] Upon consideration of these factors, self-supply may not be a viable option unless it can be done with a degree of scale. As the attached affidavits of CLEC Coalition

---

163 In fact, NuVox finds it more difficult to find alternative DS1 providers than DS3 providers, which also "varies market-to-market." Cadieux Aff., ¶ 11, ¶ 9 (discussing scarcity of DS1 transport facilities from third parties and the problems associated with "operational interfaces at the DS1 level").

164 "Extensive research has been done to identify all potential sources for these facilities. Unfortunately, the results of ongoing research continue to be the same – while option exist over a few selected transport routes and to a very small number of buildings, the only carrier with anything even close to ubiquitous coverage is the ILEC." Jackson Aff., ¶ 9 (TDS Metrocom).

165 "In some NuVox markets there is either no third-party provider of DS3 transport or only a single third-party provider ... [who] do not provide anything approaching the ubiquitous geographic coverage of dedicated transport that NuVox requires." Cadieux Aff., ¶ 11.

members demonstrate, self-provisioning of loop and transport facilities is an extremely expensive and time-consuming process, costing as much as $150,000 per mile, in addition to $10,000 rights-of-way fees.[167] Thus, there is no readily discernible formula with respect to how capacity considerations factor into the economics of self-supply.

Finally, all of these considerations pale, if a CLEC finds itself without a significant capital expenditure budget, as many now do.[168] Thus, the current market reality is that even where a build might be cost-justified, other capital expenditures that have a more immediate impact on customer service may need to be assigned a higher priority.

2. Facility considerations

In keeping with its established technology-neutral approach to unbundling, the Commission generally should not consider how a functionality is delivered in its impairment analysis. That is, of course, provided that the UNE meets industry standards and delivers the functionality desired by the requesting carrier. For example, a facility need not be freestanding to provide the functionality a requesting carrier seeks to be unbundled. By way of further illustration, DS1 dedicated transport segments frequently are derived from higher capacity facilities, with no negative effects (except, of course, if they are EEL components and then carriers must go through the ridiculous and wasteful practice of determining which circuits carry what according to an utterly crazy formula that confounds network engineers and product managers alike). Only in cases, where interference, technical feasibility or performance become

---

166 As SNiP LiNK states, it takes "literally months before a licensee is actually able to construct facilities." Polito Aff. ¶ 7 (SNiP LiNK).

167 Jackson Aff., ¶ 11 (TDS Metrocom, Inc.); *see also* Duke Aff., ¶ 8 (proprietary version).

168 For example, KMC has had to cut its 2001 and 2002 budgets for new network builds significantly. *See* Duke Aff., ¶ 4 (figures provided in proprietary version). Other carriers, like TDS, are very "careful" in

. . . *Continued*

an issue should the Commission's focus turn to the facility, rather than the functionality requested. The Commission previously has addressed both interference and technical feasibility in the DSL context.[169] Performance considerations may become relevant if use of a particular facility or configuration results in diminished performance.

The Commission asks additional questions about whether distinctions can or should be made regarding transmission or switching facilities and provides as examples, local versus toll services and circuit versus packet switching.[170] The Commission's unbundling analysis should focus on the functionality requested, rather than the type of facility used to deliver it. The suggested distinctions, in particular, are statutorily unwarranted and will serve only to facilitate ILEC mischief. Congress did not distinguish between local and toll service in its unbundling mandate and the Commission's rules should not depart from this foundation.[171] Moreover, LEC networks are transitioning toward fiber and packet switching. To the extent that UNEs are identified by technology or facility type, ILECs could upgrade themselves out of unbundling requirements. There is no evidence that Congress intended its unbundling mandate to be static –

---

planning network builds, ensuring that "each and every foray [is] being cost-justified." Jackson Aff., ¶¶ 7,8 (TDS).

169 The Commission in fact ordered line sharing above ILEC protests that such an arrangement is technically infeasible, chiefly because the ILECs provision xDSL services over a shared line themselves. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, FCC 99-355 ¶¶ 63-64 (rel. Dec. 9, 1999) ("*Line Sharing Order*"). In addition, the Commission added packet switching as an unbundled network in circumstances where ILECs have deployed digital loop carrier facilities that, absent packet switching, would preclude CLECs from providing service. *UNE Remand Order*, 15 FCC Rcd. at 3838, ¶ 313.

170 *NPRM*, ¶ 41.

171 To the extent that the Commission remains convinced that any local/toll distinction is supported by the statute and policy concerns – the Commission ought to change its focus away from "a significant amount of local service" to "exclusively toll services." The FCC's use of the term "IXC" in the context of its unbundling rules has created too much uncertainty and confusion. Most CLECs are both LECs and IXCs. In this context, the term IXC should be used to refer only to a carrier that provides interexchange services exclusively.

applying only to the network as it existed at a particular point in time.[172] Such an interpretation would make Section 251 a dead letter in a matter of years and the ILECs would then have successfully evaded Congress' will to see the great wireline monopolies replaced by robust competition.[173] Networks evolve and the unbundling rules need to be flexible enough to account for such evolution. Otherwise, modifications will be made to transmission plant for the sole purpose of evading congressionally mandated unbundling. The Commission should steer clear of regulation that engender such gamesmanship.

C. Customer and Business Considerations May Be Relevant

The Commission seeks comment on whether customer and business considerations should be factored into its unbundling analysis.[174] Both customer and business considerations may be relevant to the impair analysis. In its *UNE Remand Order,* the Commission found that "the type of customers that a competitive LEC seeks to serve is relevant to our analysis of whether the cost of self-provisioning or acquiring an element from a third-party supplier impairs the ability of a requesting carrier to provide the services it seeks to offer."[175] This analysis seems reasonable. The more difficult analysis, however, is how the Commission will decide to draw lines and whether such line drawing comports with the statutory standard and results in rules that are administratively feasible. In particular, such line drawing must comport with Section 251(c)(3)'s requirement that UNEs be made available on a nondiscriminatory basis.

---

172 "[W]e have authority to identify additional, or perhaps different, unbundling requirements that would apply to incumbent LECs in the future. The rapid pace and ever changing nature of technological advancement in the telecommunications industry makes it essential that we retain the ability to revise our rules as circumstances change." *Local Competition First Report and Order*, 11 FCC Rcd. at 15626, ¶ 246.

173 House Report at 89 ("[T]he purpose of this legislation is to shift monopoly markets to competition as quickly as possible.").

174 *NPRM*, ¶¶ 43-44.

175 *UNE Remand Order*, 15 FCC Rcd. at 3737, ¶ 81.

Thus, the Commission can look at residential and "business" classifications, which in and of themselves may be too general. The functionalities required to serve residential users in multiple dwelling units can differ dramatically from those needed to serve single family homes. Even more complex are needs and facilities used to serve "business" customers – a category that in its broadest sense includes small and medium sized customers, large enterprise customers, and institutions of varying size.

In terms of considering the characteristics of the requesting carrier, the Commission's current rules of general applicability have the considerable advantages of being both nondiscriminatory and administratively feasible. However, as competition develops and competitors and third-party providers become more robust, it is conceivable that certain carriers or types of carriers will no longer be impaired while others will. For example, carriers' ability to self-provision varies greatly and depends on a complicated array of factors. The Commission must ensure that any line drawing it engages in does not foreclose entry by new "new entrants."

Although the Commission's expressed desire to conduct a more granular unbundling analysis may point toward new line drawing, CLEC Coalition members recommend caution and restraint. Accordingly, the Coalition – save one observation – will wait to see what develops on this front before making specific recommendations. The observation is also a cautionary note and it is this: size may be an insufficient indicator of a consumer's or a carrier's needs. For example, medium sized business customers may have needs that more closely resemble the relatively simpler needs of residential customers than the generally more complex needs of enterprise customers. Even the needs of large enterprise customers – relative to the CLEC that seeks to serve them – may also vary based on the type of business they are and whether the CLEC is serving some or all needs or locations. Thus, if the Commission elects to utilize line

drawing, it should consider developing an efficient mechanism for considering when such line drawing will have unintended effects.

Finally, the Commission asks whether the availability of tariffed special access services should play a role in the Commission's unbundling analysis.[176] In its *UNE Remand Order,* the Commission addressed ILEC arguments that special access services obviated the need for UNEs and soundly rejected them.[177] It should do so again. Unless and until ILEC special access services are priced-capped at or below TELRIC, they will not provide a UNE alternative upon which robust and sustainable competition can develop.

D. The Commission Should Not Use Triggers, Head Counts or Temporal Boundaries to Substitute for the Fact-Specific Impairment Analysis Required By the Act

The Commission asks whether either "absolute temporal boundaries" or performance metrics are appropriate as "triggers for phasing out certain UNEs."[178] In so doing, the Commission seeks once again to explore the possibility of permitting an identifiable period or provisioning threshold to supplant the fact-specific unbundling analysis required by Section 251. Although timelines and triggers may be attractive for their expediency, they cannot serve as a substitute or proxy for the necessarily fact-based and time-specific impairment analysis required

---

176 *NPRM*, ¶ 44.

177 "We assign little weight in our 'impair' analysis to the ability of a requesting carrier to use the incumbent LECs' resold or retail tariffed services as alternatives to unbundled network elements." *UNE Remand Order*, 15 FCC Rcd. at 3732, ¶ 67. The Commission therefore flatly rejected US West's argument that special access services make UNEs unnecessary. *Id.*, 14 FCC Rcd. at 3732-3733, ¶ 67.

178 *NPRM*, ¶ 45.